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No. 85-1910

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BUSINESS ELECTRONICS CORPORATION,
Petitioner,

v.

SHARP ELECTRONICS CORPORATION

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF AMICUS CURIAE K MART CORPORATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Section 1 of the Sherman Act allows a supplier to conspire and agree with a full-price retailer to terminate a discount retailer for the purpose of eliminating price competition.

PARTIES TO THE PROCEEDING BELOW

Plaintiff-Appellee: Business Electronics Corporation

Defendant-Appellant: Sharp Electronics Corporation

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BRIEF OF AMICUS CURIAE K MART CORPORATION IN SUPPORT OF PETITIONER

K mart Corporation ("K mart") respectfully submits this brief as amicus curiae in support of petitioner Business Electronics Corporation.[1]

INTEREST OF THE AMICUS CURIAE

K mart operates more than 2,000 discount department stores in the United States. It is K mart's goal to offer

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[1] Pursuant to Supreme Court Rule 36.2, the parties have consented to the filing of this brief. K mart has filed their written consents with the Clerk.

the consumer quality name-brand merchandise at prices lower than those established by manufacturers or followed by other retailers. Despite its size and purchasing power, K mart is often denied access to merchandise because of collusion between a manufacturer and its independent distributors or because a full-price retailer has solicited or coerced a manufacturer's agreement not to deal with K mart because K mart is a discounter.

Given the recent lack of antitrust enforcement by the Federal Trade Commission and Department of Justice, K mart has vindicated its commercial freedom by filing private antitrust actions.[2] However, even this remedy is now threatened by some courts which, like the Fifth Circuit below, have misconstrued the decision in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), as condoning all manner of vertical price-fixing conspiracies.

STATEMENT OF THE CASE[3]

Sharp Electronics Corporation ("Sharp") is a supplier of electronic calculators distributed through a network of retail dealers. 780 F.2d at 1214. Business Electronics Corporation ("BEC") was the only authorized Sharp dealer in Houston for several years until Sharp appointed Hartwell's Office World ("Hartwell") as a Sharp dealer in the same area. 780 F.2d at 1214-1215. After complaining to Sharp for over a year about BEC's discounting practices, Hartwell presented an ultimatum to Sharp: if Sharp would not terminate BEC within 30 days, Hartwell would quit as a Sharp dealer. 780 F.2d at 1215. Sharp then terminated BEC, leaving Hartwell as the only Sharp dealer in Houston. 780 F.2d at 1215.

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[2] *See, e.g., K mart Corp. v. Rachel Perry, Inc.*, No. 83-CV-4784-DT (E.D. Mich.) (September 5, 1985 consent order prohibits Rachel Perry from conspiring with distributors to deprive K mart of access to Rachel Perry products).

[3] Facts are taken from and cited to the reported decision of the Fifth Circuit in this case, 780 F.2d 1212 (5th Cir. 1986).

The jury in this case was presented with a clear factual choice: was BEC terminated because it was a marginal retailer who failed to meet Sharp's sales quotas; or was BEC terminated when Hartwell, a full-price retailer, convinced Sharp to eliminate BEC, the only source of intrabrand retail price competition in Houston, because of its discounting. 780 F.2d at 1215. In response to very specific interrogatories and instructions, the jury concluded that BEC was terminated pursuant to "an agreement or understanding between Sharp and Hartwell to terminate [BEC] as a Sharp dealer because of [BEC's] price-cutting." 780 F.2d at 1215.

The Fifth Circuit held that this finding was insufficient. Absent proof of an agreement between Sharp and Hartwell "to set [Hartwell's] prices at some level," the court of appeals held that their vertical conspiracy to eliminate a competitor in order to end price competition was not *per se* illegal under Section 1 of the Sherman Act. 780 F.2d at 1218.

SUMMARY OF ARGUMENT

Section 1 of the Sherman Act forbids "every contract, combination . . . or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1. Historically, this provision has been read as forbidding absolutely price-fixing agreements, whether horizontal, that is between competitors at the same functional level of distribution, or vertical, that is between companies at different levels of distribution.[4]

Such absolute condemnation has been reserved for conduct most damaging to competition and economic freedom, and the conduct found by the jury in this case warrants absolute condemnation. Many less restrictive and perfectly legal alternatives were available for Sharp to

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[4] Vertical price fixing is often called "resale price maintenance" because it is generally an effort by a manufacturer to maintain or engineer resale prices at a level artificially higher than the prices which would otherwise prevail in a competitive market.

accomplish its legitimate goals in the Houston market, but Hartwell and Sharp chose improper means to accomplish an improper purpose. Their conspiracy was more damaging to competition than other conduct which is *per se* illegal. For example, Sharp could have legally terminated BEC if BEC had failed to meet sales quotas; the jury found, however, that Sharp's purpose was to eliminate retail price competition. Sharp could have legally demanded that BEC provide the services and promotion which Sharp expected of its dealers; the jury found, however, that Sharp terminated BEC because of its low prices, not its level of services. Sharp could have legally adopted a unilaterally determined suggested retail price and unilaterally terminated BEC for not adhering to it; the jury found, however, that Sharp acted at the insistence of and in collusion with Hartwell, BEC's competitor.[5]

In short, Hartwell succeeded in eliminating BEC, its only competitor, not by competing fairly or offering the consumer a superior combination of price and service, but by conspiring with and threatening Sharp.[6]

Compare this resale price maintenance conspiracy which the jury condemned and the Fifth Circuit condoned

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[5] The termination was also preceded by various threats and coercion which are not protected by *United States v. Colgate & Co.*, 250 U.S. 300 (1919). *See United States v. Parke, Davis & Co.*, 362 U.S. 29, 46 (1960), and *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 765 (1984).

[6] There appears to have been no claim that Sharp dealers provided warranty service or other functions which could justify non-price vertical restraints. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977). The jury apparently rejected Hartwell's contention that BEC was taking unfair advantage of Hartwell's "products promotion." *See* 780 F.2d at 1215. Likewise, there appears to have been no contention that the market for electronic calculators was such to justify elaborate vertical restraints. *See United States v. Jerrold Electronics Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961).

with other possible schemes of eliminating price competition which would be absolutely forbidden by Section 1 of the Sherman Act but far less pernicious than the activity approved by the Fifth Circuit: (1) BEC could have expressly agreed with Sharp to charge Sharp's suggested list price; illegal *per se*; or (2) BEC could have agreed with Hartwell to charge Sharp's suggested list price; also illegal *per se*.

In either of these scenarios, the possibility would have remained for BEC and Hartwell to cheat or renege on their price-fixing agreements; two retail competitors would have remained in the Houston market and competed at least in non-price areas. Instead, the Fifth Circuit has endowed Hartwell with a monopolistic freedom to overcharge the consumer.

Two parties, acting collusively, made an agreement to eliminate price competition and have successfully carried it out under the Fifth Circuit ruling. Such a result is not consistent with either this Court's construction of the antitrust laws or Congressional expressions of its intent. Moreover, it is inimical to the economic well-being of the American public.

ARGUMENT

I. The Antitrust Laws Have Always Been Construed As Preserving Commercial Independence At All Levels Of Distribution

The Fifth Circuit has drawn an ephemeral distinction between agreements to fix a particular price and agreements to destroy price competition. According to the Fifth Circuit, it is unlawful for a manufacturer and its dealer to conspire to set a particular price in the marketplace, but it is completely lawful for them to agree to end all price competition in the marketplace. This decision undercuts better than 75 years of the administration of the Sherman Act.

Since at least 1911, resale price maintenance has been illegal *per se* under Section 1 of the Sherman Act. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).[7] The holding in *Dr. Miles* that an agreement between a manufacturer and its dealers to maintain a minimum retail price violated the Sherman Act came despite vigorous arguments that discounters were "knaves" and that a manufacturer knew best what price the consumer would or should pay. 220 U.S. at 412 (Holmes, J., dissenting). The Court concluded that Dr. Miles, "having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic." 220 U.S. at 409. The Fifth Circuit apparently disagrees.

Judicial condemnation of vertical price fixing was a logical extension of the earliest Sherman Act decisions which recognized that agreements which gave the conspirators "the power to charge unreasonable prices" were absolutely illegal both at common law and under the Sherman Act. *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 293 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

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[7] *See United States v. Colgate & Co.*, 250 U.S. 300 (1919); *United States v. A. Schrader's Son, Inc.*, 252 U.S. 85 (1920); *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922); *United States v. Line Material Co.*, 333 U.S. 287 (1948); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951); *United States v. Parke-Davis & Co.*, 362 U.S. 29 (1960); *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964); *California Retail Liquor Dealers v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984); *324 Liquor Corp. v. Duffy*, 107 S.Ct. 720 (1987). In the past decade, the Court has distinguished between vertical agreements to set prices, which are *per se* illegal, *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984); *324 Liquor Corp. v. Duffy*, 107 S.Ct. 720, 724 (1987), and vertical agreements on non-price restrictions, which are judged under the rule of reason. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

In the cases that followed *Dr. Miles*, several threads emerged: First, a seller's freedom to choose a resale price was recognized as a most critical element of competition.[8] Second, it was *per se* illegal for a manufacturer (outside the narrow price "suggestion" boundaries of *Colgate*) to fix a particular price, set a minimum price, establish a maximum price or otherwise restrict the pricing discretion of its distributors or dealers.[9] Third, collusion to fix prices or eliminate price competition was *per se* illegal.[10]

Justice Stevens has explained why price competition receives such extraordinary protection:

> Price is the 'central nervous system of the economy,' and an agreement that 'interfere[s] with the setting of price by free market forces' is illegal on its face.

National Society of Professional Engineers v. United States, 435 U.S. 679, 692 (1978) (citations omitted).[11] This reasoning applies at the retail level, not just to manufacturers:

> It is in the sound commercial interests of the retail purchasers of goods and services to obtain the lowest price possible within the framework of our competitive private enterprise system. The essence of the

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[8] *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1950); *Simpson v. Union Oil Co.*, 377 U.S. 13, 16 (1964); *Albrecht v. Herald Co.*, 390 U.S. 145, 152 (1968).

[9] *Albrecht v. Herald Co.*, 390 U.S. 145, 152 (1968) (maximum prices); *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150, 222 (1940) (range of prices).

[10] *Albrecht v. Herald Co.*, 390 U.S. 146 (1968); *United States v. General Motors Corp.*, 384 U.S. 127 (1967); *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960); *Klor's, Inc. v. Broadway Hale Stores, Inc.*, 359 U.S. 207 (1959).

[11] As the Court has also recognized, since retail price maintenance is absolutely forbidden, it is not saved by the euphemistic labels which the conspirators may adopt. *E.g., Simpson v. Union Oil Co.*, 377 U.S. 13 (1964) (sham consignment system).

antitrust laws is to ensure fair price competition in an open market.

Reiter v. Sonotone Corp., 442 U.S. 330, 342 (1979).

In these and many other decisions, the Court carefully considered and rejected the same economic justifications which were rejected in *Dr. Miles* and which are proffered to justify vertical price fixing today.[12]

Since resale price maintenance continues to be *per se* illegal, what constitutes resale price maintenance? In this case, Sharp and Hartwell agreed to terminate BEC in order to eliminate price competition. As a result, Hartwell, who at least "usually" charged full list prices, became the only authorized Sharp dealer in Houston. 780 F.2d at 1215. Consumers were left with no choice because Hartwell had no competition in price or services. But the Fifth Circuit held that this would not be *per se* illegal unless BEC could prove that Hartwell and Sharp expressly or impliedly "agree[d] to set [Hartwell's] price at some level, though not a specific one." 780 F.2d at 1218.

This has never been the law, either in horizontal or vertical price fixing conspiracy cases, and it would place an impossible burden on an antitrust plaintiff.

Price fixing is a federal felony crime under the Sherman Act. No manufacturer wishing to eliminate competition in pricing can be expected to draw up a written agreement or to list price levels as required by the Fifth Circuit. If the Fifth Circuit is affirmed, a large part of the protection which the Sherman Act has historically accorded to the public will be wiped out.

An agreement to eliminate discounters has the purpose and effect of setting resale prices even more effectively than an agreement on specific prices. Once discounters

[12] *See Simpson v. Union Oil Co.*, 377 U.S. 13, 19 n.6 (1964); *Albrecht v. Herald Co.*, 390 U.S. 145, 151 n.7 (1971).

have been eliminated, the colluding manufacturer and dealers can victimize the public at their leisure.

The Sherman Act has been characterized as a charter of economic freedom. Any vestige of marketplace freedom is effectively undermined when courts allow admitted conspirators to drive out of the market those who do not share their view of what the resale price should be.

A. Courts Have Always Condemned Vertical Conspiracies To Eliminate Price Competition As *Per Se* Illegal

In *United States v. General Motors Corp.*, 384 U.S. 127, 142-143 (1966), Justice Fortas spoke for a unanimous Court:

> [I]t has long been settled that explicit agreement is not a necessary part of a Sherman Act conspiracy . . . .

In his concurrence, Justice Harlan was more particular:

> [A] manufacturer cannot maintain resale prices by refusing to sell to those who do not follow his suggested price if the refusal is attended by concerted action with his customers . . . .

384 U.S. at 148. These statements of the law apply to the existence of the conspiracy as well as to its purpose; a conspiracy to fix prices requires neither an explicit agreement nor an agreement on a certain price.

1. *It Is* Per Se *Illegal To Conspire On Prices, Even If A Specific Price Is Not Set*

In several cases, the Court has ruled that it is not necessary for conspirators to set a specific price in order to violate Section 1 of the Sherman Act. For instance, in *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 719 (1944), the illegal agreement was simply that dealers would "sell at locally prevailing prices and only to the public." In *United States v. General Motors*

Corp., 384 U.S. 127, 147 (1966), the Court held that "the *per se* rule applies even when the effect upon prices is indirect."

This is true in both horizontal and vertical conspiracies. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222 (1940) ("[P]rices are fixed . . . if the range within which purchases or sales will be made is agreed upon, if the prices paid or charged are to be at a certain level or on ascending or descending scales, if they are to be uniform, or if by various formulae they are related to the market prices."); *United States v. Container Corp.*, 393 U.S. 333 (1969) (*per se* illegal to exchange price information for the purpose of stabilizing prices); *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978) (*per se* illegal to agree not to negotiate on a price until after an engineer had been selected); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 645, 647-648 (1980) (*per se* illegal to agree to eliminate credit terms or to use a specific method of quoting prices).

As recently as *Monsanto* in 1984, the Court held that warning discounters that they would not receive adequate shipments and notifying them that steps were being taken to get the market "in order" constituted "sufficient evidence for the jury reasonably to have concluded that Monsanto and some of its distributors were parties to an 'agreement' or 'conspiracy' to maintain resale prices and terminate price cutters." 465 U.S. at 765.

2. *It Is* Per Se *Illegal To Conspire To Eliminate A Discounter*

The motive which the jury found in this case has been a hallmark of conduct deemed *per se* illegal by this Court in the context of both horizontal and vertical conspiracies: "Elimination, by joint collaborative action, of discounters from access to the market is a *per se* violation of the [Sherman] Act." *United States v. General Motors Corp.*, 384 U.S. 127, 145 (1966).[13]

The illegal refusal to deal in *Klor's, Inc. v. Broadway Hale Stores, Inc.*, 359 U.S. 207, 213 (1959), was initiated by a Klor's competitor and was condemned because it deprived Klor's of merchandise, deprived suppliers of the opportunity to deal with Klor's and drove small retailers like Klor's out of business. 359 U.S. at 213.

These landmark cases are sometimes characterized as horizontal because either more than one retailer (in *General Motors*) or more than one supplier (in *Klor's*) participated in the conspiracy. The common horizontal element, however, is the participation of the victim's competitor in a conspiracy designed to eliminate price competition.[14] Thus, in condemning conspiracies between a supplier and a full-price dealer to terminate a discounter, courts of appeals have held that such conspiracies have a primarily horizontal purpose and effect which has always been viewed as *per se* illegal. *Victorian House, Inc. v. Fisher Camuto Corp.*, 769 F.2d 466, 469 (8th Cir. 1985); *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164, 168

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[13] The consent order in the treble damage action instituted by K mart against Rachel Perry expressly recited:

> [Rachel Perry] agrees that a joint collaborative effort precluding a price discounter from obtaining [Rachel Perry] products from distributors in order to fix, set, or influence resale prices constitutes a conspiracy in *per se* violation of Section 1 of the Sherman Act (15 U.S.C. § 1).

K mart Corp. v. Rachel Perry, Inc., No. 83-CV-4784-DT (E.D. Mich.) September 5, 1985 consent order ¶ 9.

[14] Even though a discounter, such as BEC, faces only one competitor, such as Hartwell, it should be no less illegal for that one competitor to conspire with a common supplier to eliminate the discounter. The effect of such a conspiracy is very pernicious because *all* price competition is eliminated at a single stroke: "it matters not that the complainant may be only one merchant." *Simpson v. Union Oil Co.*, 377 U.S. 13, 16 (1964), *citing Klor's*. *See Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979), where the court found *per se* illegality based on the request of a single dealer to terminate his price-cutting competitor.

(3d Cir. 1979); *Zidell Explorations, Inc. v. Conval Int'l, Ltd.*, 719 F.2d 1465, 1470 (9th Cir. 1983); *Com-Tel v. Dukane Corp.*, 669 F.2d 404, 411 (6th Cir. 1982).

As the Third Circuit said in *Cernuto*:

> By prevailing upon United and Lappin to terminate their contract with Cernuto, Famous effectively eliminated the threatened competition and was able to maintain prices at its own preferred levels. It is just this type of conduct that the antitrust laws were designed to reach.

595 F.2d 164, 169 (3d Cir. 1979). The Fifth Circuit ruling in the instant case sanctifies the fixing of resale prices by collusion between a manufacturer and a dealer just as surely as if these parties had agreed upon a specific price.

B. Courts Have Never Imposed Impossible Evidentiary Burdens On The Victims Of A Conspiracy

It is certainly implicit in the price-related complaints of a dealer that if a discounting competitor is terminated, the complaining dealer will charge a higher price. This is particularly true where the complaining dealer enjoys a position of sufficient strength vis-a-vis the manufacturer credibly to threaten resignation if the discounter is not terminated—as Hartwell did in this case.

A conspiratorial agreement need not be express or formal to violate the antitrust laws; it may be tacit or evidenced only by a course of conduct. *United States v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 174 (3d Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); *United States v. Consolidated Packaging Corp.*, 575 F.2d 117, 126 (7th Cir. 1978). As the Ninth Circuit has observed, "a knowing wink can mean more than words" in the context of a price fixing conspiracy; therefore, "it is not necessary to find an express agreement, either oral or written, in order to find a conspiracy . . . ." *Esco Corp.*

v. United States, 340 F.2d 1000, 1007, 1008 (9th Cir. 1965).

Since secrecy and concealment are the hallmarks of a conspiracy, an antitrust plaintiff has never been expected to prove its existence with the degree of certainty inherent in a breach of contract case.[15] Although, as the Court observed in *Monsanto*, a conspiracy finding cannot be based on "highly ambiguous evidence," 456 U.S. at 763, testimonial and documentary evidence of a "meeting of the minds in an unlawful arrangement" was a sufficient basis for the *Monsanto* jury's finding of an unlawful conspiracy. 465 U.S. at 764.

Moreover, the Court made it clear in *Monsanto* that the mere fact that evidence is subject to several interpretations does not warrant the entry of a directed verdict. As the Court said, "the choice between two reasonable interpretations of the testimony properly was left to the jury." 465 U.S. at 766 n.12. In the instant case, the Fifth Circuit would not allow the jury the proper latitude specified in *Monsanto*.

C. The Rule Of Law In *Dr. Miles* Will Not Stifle Legitimate Commercial Activity

Since 1975, when the Fair Trade laws were repealed, manufacturers and dealers have successfully conducted their affairs knowing that resale price maintenance was *per se* illegal. And there was no dearth of commercial activity in the Third, Fourth, Eighth and Ninth Circuits, which followed the strict *Cernuto* rule of law:

> [I]f a manufacturer deliberately withdraws its product from a price-cutting distributor at the re-

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[15] Similarly, antitrust plaintiffs face a lower burden of proof on the issue of damages, in recognition of the fact that the defendant is in control of and can effectively conceal the facts required for more rigorous proof. *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566 (1981); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969).

> quest of a competing distributor as part of a conspiracy to protect the requesting distributor from price competition, the manufacturer has committed a per se violation of the antitrust laws.

Zidell Exploration, Inc. v. Conval Int'l, Ltd., 719 F.2d 1465, 1469 (9th Cir. 1983), *citing Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164, 170 (3d Cir. 1979).

In fact, the *per se* rule against conspiracies to eliminate price competition "provide[s] guidance to the business community and . . . minimize[s] the burdens on litigants and on the judicial system of the more complex rule-of-reason trials." *Continental T.V. Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 50 n.16 (1977). As the Court has also recognized, "without the *per se* rules, businessmen would be left with little to aid them in predicting [the outcome] in any particular case. . . ." *United States v. Topco Associates, Inc.*, 405 U.S. 596, 609 n.10 (1972).

The Court has increasingly recognized that price as well as non-price communications and complaints naturally travel from dealers to suppliers in the normal course of business, and that such communications should not be the sole basis for inferring an illegal conspiracy. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 763-764 (1984).

The "plus factors" which the Court enumerated as sufficient in *Monsanto* were present in this case. Hartwell went beyond communication when it "presented an ultimatum to Sharp," 780 F.2d at 1215, threatening to resign if Sharp did not terminate BEC. The Court has always distinguished between acceptable communication and such improper coercion.[16]

On the other hand, the Fifth Circuit approach would make resale price maintenance, accomplished through dealer vendettas against discounters, presumptively legal.

[16] *Compare United States v. Colgate & Co.*, 250 U.S. 300 (1919), *with United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960).

It would be difficult, if not impossible, for a terminated dealer to prove by the preponderance of the evidence, that the conspiring dealer had agreed with the manufacturer to charge a particular price.

II. In The View Of Congress, The Antitrust Laws Absolutely Prohibit Vertical Conspiracies To Eliminate Price Competition Even When These Conspiracies Do Not Involve The Setting Of A Specific Price

When the Sherman Act was first debated, Congress recognized the evils of both resale price maintenance and conspiracies against discounters:

> [T]hat is a contract in restraint of trade within the meaning of the bill . . . [if] customers of the manufacturer are not allowed to sell at a lower rate than that fixed by the manufacturer. . . .

21 Cong. Rec. 4089 (1890) (remarks of Rep. Culberson).

> Even if the conscience of the retailer is touched and he reduces his price[,] the trust steps on him and refuses to sell to him . . . . This monster robs . . . the consumer . . . .

21 Cong. Rec. 4098 (1890) (remarks of Rep. Taylor).

Over the past decades, Congress has often considered the arguments for and against resale price maintenance. Twenty-five years after the Supreme Court held in *Dr. Miles* that resale price maintenance was *per se* illegal, Congress passed the Miller-Tydings Amendment to the Sherman Act, exempting from antitrust illegality certain resale price maintenance agreements in states which adopted so-called Fair Trade laws.[17]

In 1976, Congress responded to the pleas of "President Ford, consumer groups, the Justice Department, the Federal Trade Commission, the Council on Wage and Price Stability, discount stores . . . smaller business associations . . . [and] newspapers across the country" by

[17] 50 Stat. 693 (1937).

enacting the Consumer Goods Pricing Act of 1975.[18] This legislation restored the *per se* illegality of resale price fixing.

The legislative history of the Consumer Goods Pricing Act of 1975 indicates Congress intended to promote price competition at the retail level:

> Some retailers prefer to try to enlarge their share of the market by competing vigorously in price-prescisely (sic) the sort of behavior encouraged by our antitrust laws. This competition is stifled by 'fair trading'.
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> * * * *
>
> To the extent that the 'Mom and Pop' retailer charges a higher price because he is providing more services to his customers, consumers should have the freedom to choose between paying more for these services and buying nothing but the unadorned product at a lower price from a competitor.

H.R. Rep. No. 341, 94th Cong., 1st Sess. 3, 4 (1975). The Court expressly recognized this legislative purpose shortly thereafter.[19]

Since that time, the Court itself has counselled businesses dissatisfied with the *per se* rule against price fixing to direct their arguments to Congress, rather than the courts.[20] And Congress has spoken on the subject in condemning Executive Branch attempts to overthrow or narrowly interpret the *per se* rule against resale price maintenance. Congress has both re-articulated its views

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[18] Pub. L. No. 94-145, 89 Stat. 801 (1975). S. Rep. No. 466, 94th Cong., 1st Sess. 2 (1975), *reprinted in* 1975 U.S. Code Cong. & Admin. News 1569, 1571.

[19] *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 51 n.18 (1977).

[20] *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 354-355, (1982). The Court had earlier advised that "Congress [could] ultimately determine . . . [to] make *per se* rules inapplicable in some or all cases." *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 n.10 (1972).

on the proper reading of Section 1 of the Sherman Act and forbidden the Department of Justice from encouraging the judiciary to modify that reading.

Since 1983, Congress has forbidden the Department of Justice from using appropriated funds to overturn or alter the *per se* illegality rule governing resale price maintenance.[21] Similarly in 1985 when the Justice Department issued Vertical Restraints Guidelines which appeared to countenance all manner of combinations and conspiracies with the purpose and effect of setting resale prices, Congress condemned the Guidelines as inconsistent with the judicial construction and legislative understanding of the antitrust laws.[22]

It is of particular importance that Congress expressly disavowed a statement in the Department of Justice Guidelines that would require proof of the fixing of a specific price as a condition precedent to establishing illegal vertical price fixing:

> The Division claims, again without accompanying authorities, that vertical price fixing is lawful so long as the agreement to fix prices does not set "specific" resale prices and is ancillary to one or more non-price restraints . . . . Such a statement appears to reject or ignore any consideration of the effects of a restraint on price in determining whether there is a price fixing agreement.
>
> * * * *
>
> In all these respects, the Guidelines are inconsistent with existing law and are also demonstrably unsound as a matter of policy.

H.R. Rep. No. 399, 99th Cong., 1st Sess. 14 (1985).

Moreover, in condemning the Guidelines, Congress expressly rejected the requirement of a specific fixed price:

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[21] Pub. L. No. 98-166, § 510, 97 Stat. 1102 (1983); Pub. L. No. 99-180, § 605, 99 Stat. 1169 (1985); Pub. L. No. 99-591, § 605, 100 Stat. 3341-73 (1986).

[22] Pub. L. No. 99-180, § 605, 99 Stat. 1169 (1985).

Whereas such policy guidelines are inconsistent with established antitrust law . . . in stating that vertical restraints that have an impact upon prices are subject to the per se rule of illegality only if there is an 'explicit agreement as to the specific prices;' [and] in stating that restraints imposed by a manufacturer at the request of dealers are vertical in nature and therefore not subject to the per se rule of illegality

* * * *

Now, therefore, be it

Resolved, That it is the sense of the Congress that the antitrust enforcement policy guidelines stated in 'Vertical Restraints Guidelines,' published by the Department of Justice on January 23, 1985—

(1) are not an accurate expression of Federal antitrust laws or of congressional intent with regard to the application of such laws to resale price maintenance and other vertical restraints of trade; [and]

(2) shall not be accorded any force of law or be treated by the courts of the United States as binding or persuasive . . . .

Pub. L. No. 99-180, § 605, 99 Stat. 1169-1170 (1985).

When Congress has so clearly expressed its intent and ratified the judicial construction of a statute, the Court is bound not to overturn that construction precipitously:

> [I]t certainly is 'not for [this Court] to indulge in the business of policymaking in the field of antitrust legislation . . . . Our function ends with the endeavor to ascertain from the words used, construed in the light of the relevant material, what was in fact the intent of Congress.'

Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories, 460 U.S. 150, 170 (1983), *quoting United States v. Cooper Corp.*, 312 U.S. 600, 606 (1941). *See also Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736-737 (1977); *Flood v. Kuhn*, 407 U.S. 258, 284 (1972); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 488-489 (1940).

III. The Public Interest Is Best Served By Preserving Retail Price Competition

Agreements to eliminate price competition by eliminating competitors should not be sanctioned by this Court: there is no public benefit in allowing a monopolistic dealer to overcharge the public; there is no public benefit in allowing a powerful dealer to bully its suppliers and intimidate its competitors; and there is no public benefit in allowing a manufacturer to coerce its dealers into holding a high, fixed price under the threat of a legalized termination.[23]

The *per se* rule for resale price maintenance is meant to preserve economic freedom of choice and maximize competition. Should millions of individual consumers decide the combination of price and service which best suits their needs? Should the thousands of retailers decide for themselves what price to charge and what profit to earn? Should these retailers strive to make their operations efficient and pass the savings on to consumers? Or should a few manufacturers conspire with their most powerful dealers to dictate the price of all subsequent sales?

Congress answered all these questions when it passed the Consumer Goods Pricing Act of 1975:

> [C]onsumers should have the freedom to choose between paying more for these services and buying nothing but the unadorned product from a competitor.

H.R. Rep. No. 341, 94th Cong., 1st Sess. 4 (1975).

Since "Fair Trade" was abolished in 1975, the retail industry has flourished through innovations and efficiencies which have satisfied actual consumer demand.

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[23] There is certainly no public benefit in allowing a powerful retailer publicly to announce that it will not purchase from suppliers who sell to discounters and to urge that other retailers follow suit. *But see Burlington Coat Factory Warehouse Corp. v. Esprit de Corp.*, 769 F.2d 919 (2d Cir. 1985), *aff'g* 597 F. Supp. 1199 (S.D.N.Y. 1984).

Now, the consumer can freely choose to patronize department stores, specialty shops, discount stores, catalog showrooms or mail order houses, whichever suits the consumer's perceived need for the desired item at the particular time.

In this free market environment, K mart, like Congress, believes that American consumers can determine where they receive the best value for their money. They see "best value" as a combination of the quality of the product, the reputation of the retail store, and the retail price. All else being equal, the lower the retail price, the more consumers will purchase. They spend their money where they perceive the best value; increasingly, they have patronized discount general merchandise stores, such as K mart. It is also K mart's observation that manufacturers (and inefficient retailers) generally tend to believe their products can and should be sold at higher retail prices than the consumers will find acceptable.

The adverse effect of resale price maintenance was proven during the so-called Fair Trade era: wealthy consumers paid significantly higher prices while lower and middle income consumers were foreclosed from purchasing items which they otherwise could have afforded. For example, the Fair Trade laws cost consumers billions of dollars in higher prices.[24] The Department of Justice found that resale price maintenance cost consumers in excess of $2 billion a year in 1975 (when only certain merchandise was "fair traded") and increased retail prices by 18% to 27%.[25] That would mean that K mart shoppers alone could have needlessly paid an additional $4.3 to $6.4 billion in 1986, if manufacturers had been permitted to fix retail prices on all merchandise K mart sold.

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[24] H.R. Rep. No. 341, 94th Cong., 1st Sess. 3-4 (1975); S. Rep. No. 466, 94th Cong., 1st Sess. 3 (1975), *reprinted in* 1975 U.S. Code Cong. & Adm. News 1569, 1572.

[25] S. Rep. No. 466, 94th Cong., 1st Sess. 3 (1975), *reprinted in* 1975 U.S. Code Cong. & Admin. News 1569, 1572.

The most ardent advocates of resale price maintenance often base their arguments on the manufacturer's prerogative to prevent "free-riding," the imagined danger that consumers browse at full-price retailers for product information and services, and then make their purchases from discounters who allegedly offer no such services.[26] These misguided economists, perhaps because they do no shopping themselves, wrongly imagine that full-price retailers always give more service than discounters, or, even more unlikely, that if a manufacturer has forced all retailers to charge a uniform high price, those retailers will necessarily vie for business by some increased sales promotion and service effort.

This is both factually incorrect and theoretically untenable. The fact that full price does not equal full service and that low price does not equal low service is verified by the first-hand experience of consumers on a daily basis and is proved by comparing the level of competition in services during the Fair Trade era with the level which prevails today.[27] And, to the extent that "free-riding" is a problem, Congress itself suggested a far less pernicious and more effective solution than vertical price-fixing:

> [T]he manufacturer could solve this [free-rider] problem by placing a clause in the distributorship contract requiring the retailer to maintain adequate service.

S. Rep. No. 466, 94th Cong., 1st Sess. 3 (1975), *reprinted in* 1975 U.S. Code Cong. & Admin. News 1571.

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[26] K mart spent over $495 million in 1986 on product promotion—and still offered substantial discounts from manufacturer's suggested resale prices and full-price retailers.

[27] Of course, neither full price retailers nor discounters provide significant "service" on most of the consumer goods which were fair traded, such as housewares, clothing and health and beauty aids.

In 1983, the House Committee on Government Operations invited K mart to express its views at oversight hearings on federal antitrust enforcement policy. K mart solicited the opinions of its customers toward manufacturer's vertical price fixing and the retailer's freedom to charge the price it chooses. In a three-week period, consumers sent Congress over one million messages that they cherished their freedom to buy brand name merchandise at discount prices and that they wanted the federal government to stop resale price maintenance.[28] Thus, those who purport to base their defense of resale price maintenance on the welfare of consumers simply ignore the consumers' own perception of their best interests.

Moreover, notwithstanding statements of theory which are either unverified or supported by only the flimsiest of anecdotal evidence, vertical price fixing of the type condoned by the Fifth Circuit stifles efficient and innovative distribution by subsidizing inefficient retailers at the consumers' expense.

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[28] Oversight of Federal Trade Commission Law Enforcement: Fiscal Years 1982 and 1983: Hearings before the Commerce, Consumer and Monetary Affairs Subcomm. of the House Comm. on Government Operations, 98th Cong., 1st Sess. 9 (1983) (statement of Bernard M. Fauber, K mart Chairman and Chief Executive Officer).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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